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CIRCUIT COURT OF SUSSEX COUNTY, VIRGINIA.

W. W. MURPHY V. NORFOLK & WESTERN RAILWAY COMPANY.*

1. RAILROADS—*Negligence*. It is negligence in a railroad company to allow hay or other food for livestock to remain on its depot premises an unreasonable length of time, in places where it is likely to attract stock running at large.
2. MUNICIPAL CORPORATIONS—*Ordinances—Construction*. An ordinance of a municipal corporation allowing the stock of non-residents to run at large within the corporate limits, whilst forbidding the running at large of the stock residents of the town is unreasonable, and neither general in its nature nor impartial in its operation, and is therefore void.
3. MUNICIPAL CORPORATIONS—*Ordinances—Valid in part*. If an ordinance consists of several distinct and independent parts, although one or more of them are void, the rest are equally valid as though the void clauses had been omitted; but when the valid part is so connected with and dependent on that which is void, as that the parts are not distinctly separable, so that each can stand alone, as the will of the law making body, the whole must fall.

The opinion states the case.

R. W. Arnold, for the plaintiff.

George S. Bernard, for the defendant.

HON. J. F. WEST, J.

This is an action brought by the plaintiff, against the defendant company, to recover damages for the alleged negligent killing of the plaintiff's cow.

STATEMENT OF MATERIAL FACTS IN THE CASE.

Plaintiff's cow was killed by the defendant company's engine, near the company's depot, in the town of Wakefield, Sussex county, Virginia, on September 8, 1903. The engineer in charge of the train did all he could do, having a due regard for the duty which he owed the passengers on his train, to stop his train and prevent an injury to defendant's cow. The plaintiff resided outside of the town of Wakefield, in Wakefield Magisterial District, where the fence law was in force, that is, where the land owners are required to fence in their open lands and are permitted to let their stock run at large. The town of Wakefield is also located in Wakefield Magisterial District. At the time the cow was killed, it was the habit of the defendant company to leave hay and grain

* Reported by C. B. Garnett.

scattered about the side-track at the point at which the cow was killed, and at other places about the depot. The grain and hay were scattered there by different people, who bought in car-load lots, whilst unloading the cars. It was a custom of the company to clean up around the depot about once a week, but cattle and hogs were frequently attracted to this place by the hay and grain which were scattered upon and permitted to remain upon the premises. Other stock had been killed about the same spot.

At the time the cow was killed there was in force, in the town of Wakefield, an ordinance, adopted May 12, 1903, regulating the running at large of stock, within the corporate limits of said town, which ordinance was in the following words and figures, to-wit:

"First. Be it ordained by the Council of the town of Wakefield, that if any horse, sheep, goat, cow or hog be found running at large within the corporate limits of said town, the owner thereof shall pay a fine of not more than (\$1.00) one dollar for each offense, and it shall be the duty of the sergeant of said town to impound such horse, sheep, goat, cow or hog, and he shall be allowed fifty cents for his services, in each case, and twenty-five cents per day for feeding such horse, sheep, goat, cow or hog so impounded, which amount shall be assessed and collected from the owner of such animal. And if the owner of any such animal so impounded shall fail to reclaim the same, and pay such fine and charges, within twenty-four hours, the sergeant shall, after duly advertising the time and place of sale for five days, sell such animal by public auction, and pay such fine, costs and charges. This ordinance applies to all stock owned by persons living in the town of Wakefield.

"Second. Be it ordained by the Council of the town of Wakefield, that if any bull or boar be found running at large within the corporate limits of said town, the owner thereof shall pay a fine of not more than one dollar (\$1.00) for each offense, and it shall be the duty of the sergeant of said town, to impound such bull or boar, and he shall be allowed fifty cents for his services in each case, and twenty-five cents per day for feeding such bull or boar so impounded, which amount shall be assessed and collected from the owner of such animal. And if the owner of such animal, so impounded, shall fail to reclaim the same, and pay such fine and charges, within twenty-four hours, the sergeant shall, after duly advertising the time and place of sale for five days, sell such animal, by public auction, and pay such fine, costs and charges. This

ordinance applies to the above described stock, owned by persons living outside of the corporate limits of the town of Wakefield."

The plaintiff contends that the defendant is liable for the value of the cow, for the reasons that the defendant negligently permitted hay and corn to remain scattered upon its depot premises, by means whereof the defendant's cow was attracted there and killed. The defendant claims that there was no negligence in leaving hay or corn on or near the track at the place at which the cow was struck by defendant's engine; and that, if the defendant was negligent in that respect, the plaintiff was doing an illegal act which contributed to the injury sustained by him, and, therefore, cannot recover.

It is negligence in a railroad company to allow hay or other food for live stock to remain on its depot premises an unreasonable length of time, in places where it is likely to attract stock running at large.

The law governing such cases is stated in section 1211, on page 1868, vol. 2, "Elliott on Railroads," as follows:

"When an animal has been attracted by an article which has been scattered over and about the track, during the process of loading or unloading and is allowed to remain there, the company may sometimes be liable. Thus, where salt, in being unloaded, was scattered over the track and allowed to remain there, the company was held liable for injuries to an animal which had been attracted to the place by the salt. And the company was held liable under similar circumstances, where cotton seed had been allowed to accumulate on the track." See, also, *Schooling v. St. Louis, etc. R. Co.*, 75 Mo. 518; *Crafton v. Hannibal, etc. R. Co.*, 55 Mo. 580; *Little Rock, etc. R. Co. v. Dick*, 52 Ark. 402; *Page v. North Carolina R. Co.*, 71 N. C. 222.

The preponderance of the evidence in this case shows that the defendant had permitted hay to be scattered upon and to negligently remain upon the depot premises at Wakefield, and that the plaintiff's cow was attracted there by it, and killed. The plaintiff is, therefore, entitled to recover, unless, as claimed by the defendant's counsel, the plaintiff was guilty of contributory negligence. Was the plaintiff guilty of such contributory negligence? The answer to this question involves the construction of the ordinance of the town of Wakefield, *supra*, adopted May 12, 1903. Had the

plaintiff been a resident of said town, it would be unnecessary, according to the defendant's view of the case, to consider the meaning and effect of said ordinance. But the last sentence of section 1 of the ordinance, which makes it unlawful to allow cows and other live stock, named therein, to run at large, within the corporate limits of the town of Wakefield, reads as follows:

"This ordinance applies to all stock owned by people living in the town of Wakefield." And the last sentence of section 2 of the ordinance, the section which relates to bulls and boars, reads as follows: "This ordinance applies to the above described stock, owned by persons living outside of the corporate limits of Wakefield."

It is said by Judge Dillon, in 1 Dillon on Municipal Corporation, section 322: "As it would be unreasonable and unjust to make an act done by one person penal, and if done by another, not so, ordinances which have this effect cannot be sustained. . . . The powers vested in municipal corporations should, as far as practicable, be exercised by ordinances, general in their nature, and impartial in their operation."

Holt, C. J., speaking for the court in *Simrall v. Covington*, 90 Ky. 44, says: "Perhaps the most distinguishing feature of the common law is its regard for the protection and equality of individual rights. It is a rule, therefore, that when the by-laws of a municipality, enacted under a general grant of power, or by virtue of its incidental authority, is unfair and partial in its operation, it will be declared void." A by-law, to be reasonable, should be in harmony with the general principles of the common law. See Cooley on Constitutional Limitations, pages 200 and 202.

It is plain, therefore, that the ordinance of May 12, 1903, when construed as a whole, and accordingly as allowing the stock of non-residents, bulls and boars excepted, to run at large within the corporate limits of the town, whilst forbidding the running at large of the stock of residents of the town, bulls and boars excepted, is unreasonable, and neither general in its nature nor impartial in its operation, and therefore void. And, upon such construction of said ordinance, the contention of the defendant, that the plaintiff was doing an illegal act, which contributed to the injury sustained by him, must be overruled.

But, it is earnestly and ably contended by the distinguished counsel for the defendant that, under the rule of law that, "An ordinance, like a statute, may be valid in part and void as to the

residue," the court should strike out the last sentence of each section of the ordinance, the sentence above quoted, in each section, that makes the ordinance unreasonable and partial in its operation, and construe the residue of the ordinance as though these objectionable parts had no existence, with the result that the ordinance, so construed, would apply to cows owned by persons residing outside of the town of Wakefield.

"The rule is, that if a by-law consists of several distinct and independent parts, although one or more of them may be void, the rest are equally valid as though the void clauses had been omitted." *M. & O. R. R. Co. v. State*, 29 Ala. 573.

There have been several cases in Virginia where statutes have been held valid in part and void in part. *Carter v. Commonwealth*, 96 Va., 791, and *Trimble v. Commonwealth*, 96 Va., 818. The rule of construction as to statutes and ordinances is the same, in this respect.

When the valid part is so connected with and dependent on that which is void, as that the parts are not distinctly separable, so that each can stand alone, as the will of the law-making body, the whole must fall. *Black v. Trower*, 79 Va., 129, and authorities cited.

In passing the ordinance in question, it was the evident purpose of the council of the town of Wakefield not to prohibit the cows owned by non-residents of said town from going at large within the corporate limits of said town. To hold, in accordance with the view which has been urged by the defendant, that the ordinance is valid in part and void in part, would be in effect, not only to make a new ordinance, but one which it cannot be assumed that the council of said town would have been willing to make. This the court has no right to do, and the question of new legislation must be left to the council of said town.

The court is, therefore, of the opinion that the entire ordinance is inoperative and void, and doth so adjudge, and that the plaintiff was not doing an illegal act, which contributed to the injury sustained by him, when he knowingly permitted his cow to go at large in the corporate limits of the town of Wakefield. It follows, necessarily, that the plaintiff is entitled to recover of the defendant the value of his cow, which the court adjudges to be \$30. Whereupon, it is considered by the court that the plaintiff recover of the defendant the said sum of \$30 and his costs by him in this behalf expended.